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No. 95-199

In The

Supreme Court of the United States

October Term, 1995

THE NAVAJO NATION,

Petitioner,

v.

THE HOPI TRIBE and
THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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The Navajo Nation (the "Nation") respectfully submits the following brief in reply to the Brief in Opposition for Respondent the Hopi Tribe.

1. In an effort to bolster the Ninth Circuit's decision, the Hopi Tribe argues that between 25 U.S.C. § 640d-17(c) (1988) and 25 U.S.C. § 640d-17(e) (1988), the Nation's immunity against an award of prejudgment interest has been abrogated. However, this contention is wholly unsupported by the Ninth Circuit's decision. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995). Indeed,

other than a passing reference to § 640d-17(c) in describing the district court's opinion, the Ninth Circuit's decision is silent with respect to that section of the Navajo-Hopi Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (codified as 25 U.S.C. §§ 640d to 640d-31 (1988 & Supp. 1993) ("Settlement Act")).

Section 640d-17(c) provides:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable *to insure the quiet and peaceful enjoyment of the reservation lands* of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter.

25 U.S.C. § 640d-17(c) (1988) (emphasis added). In an earlier decision construing this section of the Act, the district court ruled that it "merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree." *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1187 (D. Ariz. 1978), *aff'd in part rev'd in part*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980). At issue in *Sekaquaptewa v. MacDonald* was whether an action for an accounting with respect to the 1934 reservation lands[1] had been authorized by Congress when it adopted § 640d-17(c). The district court ruled that an action for an accounting was "not necessary to effectuate any decree this Court might make, or 'to insure the

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[1] The 1934 reservation lands are to be distinguished from the 1882 Executive Order reservation lands. The former lands are treated separately under the Navajo-Hopi Settlement Act (*see* 25 U.S.C. § 640d-7 (1988)) and are not at issue in the instant litigation.

quiet and peaceable [sic] enjoyment of the reservation lands.' " 448 F. Supp. at 1187 (quoting 25 U.S.C. § 640d-17(c) (1988)).

The court of appeals agreed with the district court that implying a claim for an accounting would be inconsistent with the Nation's sovereign immunity. The appeals court stated that "[t]he United States and Indian tribes such as the Navajos possess coextensive sovereign immunity. . . . When Congress consents to suit [against a tribe], it may impose limitations. Limitations must be 'strictly observed and exceptions thereto are not to be implied.' " *Sekaquaptewa v. MacDonald*, 619 F.2d at 808 (citation omitted).

The district court in the instant litigation, just like the district court and the court of appeals in *Sekaquaptewa*, concluded that § 640d-17(c) merely "authorizes additional actions between the tribes which may be necessary to insure *quiet enjoyment of the tribes' reservations.*" *Hopi Tribe v. Navajo Tribe*, Civ. No. 85-801 PHX EHC, 87-1966 PHX EHC (Consolidated) Slip Op. 19 (D. Ariz. 1992) (emphasis added) (Pet. App. 58). Since an award of prejudgment interest on post-partition rent has nothing whatever to do with the quiet enjoyment of tribal lands, the district court properly concluded that § 640d-17(c) did not contain an express waiver of the Nation's immunity against such an award.

The Ninth Circuit relied solely on § 640d-17(e) in finding a waiver of the Nation's sovereign immunity with respect to an award of prejudgment interest. In fact, the Hopi Tribe is unable to cite to any portion of the Ninth Circuit's opinion supporting its claim that the waiver of

the Nation's immunity from an award of prejudgment interest is found in 25 U.S.C. § 640d-17(c) (1988) because no such analysis exists. Thus, the Hopi Tribe's effort to bolster the Ninth Circuit's decision is unsupported by the panel's opinion.

2. Moreover, the Hopi Tribe has distorted the Nation's argument concerning waivers of sovereign immunity. A waiver or abrogation of tribal sovereign immunity must be express. The Ninth Circuit's finding that § 640d-17(e) accorded the parties "blanket authorization of 'all remedies available' in federal district courts. . . . " 46 F.3d at 922 (Pet. App. 33), violated the long-standing principle that tribal sovereign immunity will not be deemed abrogated by congressional legislation unless expressed unequivocally therein.[2] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506 (1949); *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989).

The Nation challenges whether the language of § 640d-17(e) constituted an express waiver of immunity from an award of prejudgment interest. Under the "no-

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[2] It must be remembered that the Ninth Circuit's reliance on the "all remedies available" language in § 640d-17(e) to support its conclusion that the Nation's sovereign immunity against an award of prejudgment interest was abrogated is misplaced. Those words modify the substantive provision of that section, which relates solely to "the enforcement and collection of judgments in the district courts of the United States. . . . " Section 640d-17(e) has nothing to do with prejudgment interest or any other remedies available to litigants in district courts.

interest" rule, without such an express waiver, an award of prejudgment interest cannot be made against a sovereign. The no-interest rule has been applied to prevent parties from recovering interest in a suit against the United States in the absence of an express waiver of sovereign immunity from an award of interest. *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986). Likewise "[t]he common law immunity afforded Indian tribes is coextensive with that of the United States. . . . " *Evans v. McKay*, 869 F.2d at 1345; *Sekaquaptewa v. MacDonald*, 619 F.2d at 808 ("The United States and Indian tribes such as the Navajos possess coextensive sovereign immunity."). The principles of the no-interest rule apply equally to an Indian tribe unless or until the rule is expressly limited by Congress. *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506 (1949). Consistent with prior decisions of the Court, as well as the Ninth Circuit, § 640d-17(e) does not contain an express limitation of the "no interest" rule and, therefore, cannot abrogate the Nation's immunity against an award of prejudgment interest.

3. The Ninth Circuit failed in its attempt to explain why Congress unequivocally authorized the imposition of prejudgment interest in §§ 640d-17(a)(1) and (a)(2), but failed to mention prejudgment interest in § 640d-15(a). The Hopi Tribe's explanation is that "[b]ecause Congress neither specified nor prohibited prejudgment interest in [§ 640d-15(a)], the Ninth Circuit correctly held that a court has discretion to award it." (Brief in Opp. 16). This conclusion is not logical. In fact, the Ninth Circuit reached the opposite conclusion in an earlier related case. *See Sekaquaptewa v. MacDonald*, 619 F.2d at 809, *infra* p. 6.

The Hopi Tribe attributes Congress' silence on the subject of prejudgment interest in § 640d-15(a) to institutional insouciance. According to the Hopis, when Congress was silent on the subject, it intended to pass the buck to the courts to decide whether there would be an award of interest.

However, the rule is clear that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *Accord INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Accordingly, if Congress had intended to include an interest award in addition to post-partition rent, prejudgment interest would have been expressly provided for in § 640d-15(a).

In *Sekaquaptewa v. MacDonald*, the Ninth Circuit affirmed the district court's conclusion that the Hopi Tribe was not entitled to an accounting in connection with its claim to 1934 reservation lands. 619 F.2d at 809. Congress explicitly provided for an accounting in connection with the 1882 reservation lands. *See* 25 U.S.C. § 640d-17(a)(1) (1988). However, Congress was silent regarding an accounting claim with respect to the 1934 reservation lands. *See* 25 U.S.C. § 640d-7 (1988). The Ninth Circuit concluded, therefore, that congressional silence barred such a claim. Likewise, congressional silence regarding prejudgment interest in § 640d-15(a), as contrasted with §§ 640d-17(a)(1) and (a)(2) where Congress explicitly provided for such awards, should lead to

the same result – that an award of prejudgment interest on post-partition rent has not been authorized.

4. The Hopi Tribe argues, as it did in the district court and the appeals court, that the Nation does not enjoy sovereign immunity against another sovereign for purposes of prejudgment interest. It attempts to support this argument by comparing the Navajo Nation to a state and cites *Texas v. New Mexico*, 482 U.S. 124 (1987). (Brief in Opp. 17). This argument was rejected by the district court (Pet. App. 60-61) and ignored by the appeals court.

The Supreme Court has determined that Indian tribes are not states within the meaning of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Rather, the Commerce Clause draws a clear distinction between states and Indian tribes. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). Moreover, Indian tribes did not surrender their immunity in the plan of convention. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2583 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.") Likewise, Indian tribes did not ratify the United States Constitution. Therefore, the Hopi Tribe's rationale and reliance on *Texas v. New Mexico* fails. Express statutory authorization must be given before a waiver of tribal sovereign immunity can be found.

CONCLUSION

For the reasons expressed in its petition and in this reply brief, the Nation respectfully requests that the Court grant its petition for writ of certiorari. In the alternative and because the Ninth Circuit appears to be incapable of following its own prior decision in the related case of *Sekaquaptewa v. MacDonald*, Petitioner suggests that summary reversal is in order.

Respectfully submitted,

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